

THE NEGLECTED VIRTUES OF BRIGHT LINES: INTERNATIONAL LAW IN THE 2014 UKRAINE CRISES

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I. INTRODUCTION

Given the prevalent absence of authoritative interpretation—let alone adjudication and enforcement—international law is frequently dismissed as so open-textured as to admit of competing conclusions about its application to any significant controversy. At the same time, ironically, international law incurs criticism for the inflexibility of its foundational rules, which are deemed both insensitive to imperative principles of justice and unrealistic in the face of non-compliant but efficacious policies. The Ukraine Crises of 2014 offer the following reminders: that international law indeed has determinate relevant applications; that its characteristic inflexibilities ground cooperation among participants who cannot be expected to agree about justice; and that delegitimation of unlawful conduct serves an important purpose even where non-compliant policies cannot be reversed in the near term.

Russia's armed take-over of Crimea and its direct and indirect forcible interventions in support of the "Peoples Republics" of Donetsk and Luhansk are unambiguous violations of international law. Unavailing are efforts by Russia's apologists to rationalize these acts by reference to the increasingly widespread acceptance of Kosovo's 2008 Unilateral Declaration of Independence and to the 1991–1992 recognitions of Croatia and Bosnia-Herzegovina amid the non-consensual dissolution of the Socialist Federal Republic of Yugoslavia. The Yugoslav cases have,

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however, inspired among many advocates and scholars a disparagement of the traditional territorial integrity norm for its insensitivity to claims based on considerations of democracy, constitutionality, history, or ethno-national coherence.¹

The Ukraine crises illustrate the dangers of invoking such considerations against the norm of territorial inviolability, given the multifarious interpretations of those considerations in a pluralistic international legal environment. By taking these considerations “off the table,” traditional norms against cross-border projections of military power transcend competing perspectives on the legitimacy and justness of internal arrangements. Breaches of foundational norms can thus be identified without invoking parochial propositions that would signal just another political conflict, improving the prospects of cross-sectional condemnation.²

II. INTERNATIONAL LEGAL IRRELEVANCIES

A. *The Allegedly Unconstitutional Change of Government in Kiev*

In February 2014, following massive opposition demonstrations and a violent response by his government’s forces, Ukrainian President Viktor Yanukovych fled the capital, ultimately taking refuge in Russia.³ The Ukrainian Legislature thereupon purported to formalize his removal from office and to replace him with an acting president.⁴ Nonetheless, in the contemporaneous words of Center for Strategic & International Studies fellow Stefan Soesanto:

Ascertaining the legitimacy of the interim government in Kiev is quite tricky. According to Article 111 of the Ukrainian constitution, the President can only be impeached from office by parliament through “no less than three-quarters of its constitutional composition.” On February 22, 2014 the Ukrainian parliament voted 328–0 to impeach President

1. See, e.g., JURE VIDMAR, *DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW: THE EMERGENCE OF NEW STATES IN POST-COLD WAR PRACTICE* (Hart Publishing, 2013).

2. The General Assembly reaffirmed Ukrainian territorial integrity, against the purported transfer of Crimea to the Russian Federation, by a vote of 100 to 11—though disappointingly, there were 58 abstentions and 24 absences. See generally G.A. Res. 68/262, U.N. GAOR, 68th Sess., Supp. No. 33(b), U.N. Doc. A/68/L.39 (Mar. 27, 2014).

3. See generally Stefan Soesanto, Comment, *Russia in Ukraine: A Reader Responds*, LAWFAREBLOG.COM (Mar. 5, 2014), available at <http://www.lawfareblog.com/2014/03/russia-in-ukraine-a-reader-responds/> (last visited Jan. 21, 2015).

4. *Id.*

Yanukovych who fled to Russia the night prior. However for an effective impeachment under constitutional rules the 449-seated parliament would have needed 337 votes to remove Yanukovych from office. Thus under the current constitution, Yanukovych is still the incumbent and legitimate President of the Ukraine.⁵

The question became somewhat more than academic when Russia cited an invitation from the constitutional President to send troops into Crimea “to protect civilians.”⁶

Traditional doctrine responds to this controversy with a simple “so what?” The international legal order is not a legal order per se, but it is one of sovereign political communities bearing the “inalienable right” to choose their own political systems, and therefore to breach, to alter, or to overthrow their existing constitutions. The test for a governmental apparatus’ capacity to exercise a state’s international legal rights has traditionally been “effective control through internal processes”; this has generally remained so—save for highly exceptional circumstances (Haiti, 1991–1994; Sierra Leone, 1997–1998; Cote d’Ivoire, 2010–2011)—even where unconstitutional changes of government have drawn adverse political reactions (including suspensions of the state’s participation in intergovernmental organizations).⁷

Having been effectively ousted, Yanukovych lacked all standing to speak for Ukraine internationally. Still, less did he have standing to consent unilaterally on Ukraine’s behalf to the introduction of foreign forces to enforce a partisan conception of public order (one that had manifestly suffered substantial—even if not country-wide—popular repudiation).⁸

5. *Id.*

6. See *Ukraine's Yanukovych Asked for Troops, Russia Tells UN*, BBC.COM (Mar. 4, 2014), available at <http://www.bbc.com/news/world-europe-26427848> (last visited Jan. 21, 2015). But see Associated Press, *Yanukovych Says He Was 'Wrong' on Crimea*, N.Y. TIMES (Apr. 2, 2014), available at <http://www.nytimes.com/aponline/2014/04/02/world/europe/ap-eu-russia-yanukovych.html?%20ref=world&r=0> (last visited Jan. 21, 2015).

7. See Brad R. Roth, *Sovereign Equality and Non-Liberal Regimes*, 43 NETH. Y.B. INT’L L. 25, 44–48 (2012).

8. By the logic of self-determination that grounds the effective control doctrine, even a still-recognized government—at least, where its recognition had been essentially attributable to its having achieved effective control through internal processes—would appear to lack standing to invite foreign forces to resolve a full-blown crisis of governmental authority. See, e.g., Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT’L L. 189, 233–34 (1985); Justitia Et Pace Institut de Droit Int’l, Res., *The Principle of Non-Intervention in Civil Wars* (Aug. 14, 1975), available at http://www.idi-iil.org/idiE/resolutionsE/1975_wies_03_en.pdf (last visited Jan. 21, 2015). This limitation has, concededly, not held up well in practice, especially where the government has had other indicators of popular approval or the opposition has been tainted by unlawful foreign assistance or peculiarly bad conduct.

Even more clearly, disturbance of a governmental order does not vitiate the territorial integrity of a state; such a disturbance at most raises questions about the legal standing of the agent (the government) to represent the principal (the state), not about the principal's status or sovereign rights. Thus, a breach of constitutional norms does not problematize the unity of a state—irrespective of whether its constitutional organization is federal or unitary⁹—even where the irregularly constituted government is unpopular or not immediately efficacious in particular parts of the national territory.¹⁰

B. Crimea's Alleged Will to Secede and to Join the Russian Federation

In a hastily organized referendum held under less than “free and fair” conditions, an ostensible majority of Crimean voters opted for secession from Ukraine and incorporation into Russia.¹¹ Notwithstanding the irregularities that tainted both the regional parliament's vote to call the referendum and the referendum itself, Crimea's ethnic mix and various evident manifestations of regional public opinion lend a general plausibility to the claim that some substantial majority (even if not the officially-reported overwhelming majority) favored the region's transfer to Russian control.¹²

9. See, e.g., Convention on the Rights and Duties of States (Montevideo Convention), Dec. 26, 1933, 165 L.N.T.S. 19, 28 AM. J. INT'L L. Supp. No. 75 art. 2 (1934) (“The federal state shall constitute a sole person in the eyes of international law.”).

10. Unfortunately, the Badinter Commission's opinions on the 1991–1992 Yugoslav crisis blur the lines, reasoning that since the very existence of the Yugoslav state presupposed functioning federal institutions, the collapse of these institutions and the recourse to force entailed nothing less than “a process of dissolution” of the Yugoslav state into its component republics. See Conference on Yugoslavia Arb. Comm'n: Opinions on Questions Arising from the Dissolution of Yugoslavia, Jan. 11 and July 4, 1992, 31 I.L.M. 1488, 1496–1500 (1992). However, this rationale of the European Community's arbitral commission arose in response to unique circumstances, and no general trend has emerged along these lines.

11. David M. Herszenhorn, *Crimea Votes to Secede From Ukraine as Russian Troops Keep Watch*, N.Y. TIMES (Mar. 16, 2014), available at <http://www.nytimes.com/2014/03/17/world/europe/crimea-ukraine-secession-vote-referendum.html> (last visited Jan. 28, 2015); but see C.J. Chivers & Patrick Reeve, *Russia Moves Swiftly to Stifle Dissent Ahead of Secession Vote*, N.Y. TIMES (Mar. 14, 2014), available at <http://www.nytimes.com/2014/03/15/world/europe/pressure-and-intimidation-sweep-crimea-ahead-of-secession-vote.html> (last visited Jan. 28, 2015) (“With a mix of targeted intimidation, an expansive military occupation by unmistakably elite Russian units and many of the trappings of the election-season carnivals that have long accompanied rigged ballots across the old Soviet world, Crimea has been swept almost instantaneously into the Kremlin's fold.”).

12. *Crimea referendum: Voters 'back Russia union'*, BBC.COM (Mar. 16, 2014), available at <http://www.bbc.com/news/world-europe-26606097> (last visited Jan. 28, 2015) (“Some 58% of people in Crimea are ethnic Russian, with the rest made up of Ukrainians and Tatars.”).

Even were this conclusion to be plainly verified, the territory's international legal status would, by the operation of traditional doctrine, be unaffected. Sub-national units, notwithstanding even an unambiguous expression of a popular will to secede, lack an international legal right to be recognized as independent and thereby invite foreign intervention. Even if "remedial secession"—as to the legality of which the International Court of Justice expressly withheld judgment in its advisory opinion on Kosovo's unilateral declaration of independence¹³—could be successfully invoked in the face of demonstrable predation on the part of the central government, mere popular apprehension about possible future predation would not plausibly justify a change in a region's international status.

The region's ethnic composition—however dissimilar to that of the state to which it presently belongs, or compatible with that of the state to which it aspires to belong—is not legally material. Nor is it material that the region's original incorporation into the former state occurred for arbitrary reasons and in contradiction to the region's historical ties to the latter state. The world's territorial allocations are notoriously arbitrary, and if such arbitrariness were allowed to problematize interstate boundaries, the result would be to license violent territorial disputes across the globe.

Nor can "democratic" considerations—whatever claim may be made for their increased relevance in international law¹⁴—resolve the "majority of whom?" problem, which is inherent in self-determination controversies outside the decolonization context.¹⁵ Not only is the regional population not the sole cognizable stakeholder, but majority votes within a sub-national territory may compromise the political equality of internal minorities. Even where regional boundaries have a pre-existing constitutional status and reflect historical delineations rather than ethnic gerrymandering, the international order has little reason to disincentivize conferrals of constitutional autonomy by transmogrifying them into instruments for the disruption of state sovereignty.

C. *Ukraine's Recourse to Force to Resolve a Political Dispute in Its Eastern Regions*

In response to the proclamations of the "People's Republics" of Donetsk and Luhansk, the Ukrainian central government has demonstrated

13. See generally Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141 (July 22, 2010).

14. See, e.g., Gregory H. Fox & Brad R. Roth, *Democracy and International Law*, 27 REV. INT'L STUD. 327, 330 (2001).

15. See Brad R. Roth, *Secessions, Coups, and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELB. J. INT'L L. 393, 415 (2010).

resolve to restore its territorial integrity through the use of military force. This might be thought to run afoul of an emerging international legal norm against recourse to force to resolve internal political disputes—an internal *jus ad bellum* responsive to the contemporary reality that civil conflicts rather than interstate wars now constitute the greatest overall “threat to the peace.”¹⁶ Such a development might even be imagined to license Russia to provide cross-border military support (in the form of weaponry or even direct uses of force) to the embattled enclaves, to prevent their being bloodily overrun and to encourage a political rather than a military solution.

However much some might wish to see the emergence of an internal *jus ad bellum*, its realization in positive international law is far-off and likely to be elusive. Such a norm—unless it were to freeze any *status quo* established by whatever means on the ground, thereby rewarding quick forcible seizures—would require prejudgment of the merits of internal disputes. Absent such prejudgment—analogueous to, but inevitably far more complicated than, the international order’s insistence on respect for borders (however arbitrarily drawn)—it would be impossible to answer the fundamental question: Is what counts as “recourse to violence” the resistance to *de facto* territorial authority, or the suppression of that resistance? Any such intricately qualitative judgment would be open to charges of bias and parochialism.

Thus far in international law, states maintain the sovereign right to suppress challenges to their territorial integrity, and their acknowledged governments are vested with authority on their behalf to use force (within the tactical limitations established by international *jus in bello* norms) to secure that aim. More crucially, no foreign state has the authority to supply cross-border support to forces defending insurgent-held internal territory.¹⁷ The paradigmatic example is the lawfulness (putting aside the *jus in bello* controversies) of Croatia’s forcible extinguishment (in Operations Flash and Storm of 1995) of Serb-nationalist insurgent enclaves in Western Slavonia and Krajina, as against the almost-universally acknowledged

16. It is sometimes suggested that the pattern of recent Security Council’s Chapter VII edicts in response to internal conflicts establishes a norm against recourse to violence to resolve internal political disputes. See, e.g., Kalkidan Obse, *The Arab Spring and the Question of Legality of Democratic Revolution in Theory and Practice: A Perspective Based on the African Union Normative Framework*, 27 LEIDEN J. INT’L L. 817, 828–29 (2014). But the Security Council’s extemporary decrees, even if they could be said to comprise such a pattern, do not by themselves establish norms applicable in the absence of Chapter VII resolutions.

17. See, e.g., U.N., Declaration on Principles of Int’l Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the U.N., G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 85, U.N. Doc. A/2625 (Oct. 24, 1970) (adopted without a vote) (“no State shall . . . interfere in civil strife in another State.”).

unlawfulness of support for those enclaves by the Federal Republic of Yugoslavia (Serbia and Montenegro).

III. THE 2014 UKRAINE CRISES AS AN ARGUMENT AGAINST MUDDYING THE WATERS

Russia has crossed a bright line. Observers from a multiplicity of normative perspectives can perceive in common this transgression. The bright line exists as part of a framework of accommodation among bearers of a diversity of interests and values.¹⁸ It makes possible cooperation among international actors who cannot be expected to agree on the legitimacy or justice of internal governmental arrangements. If, in pursuit of a higher justice, the global system forsakes traditional norms in favor of more nuanced and value-laden approaches to international involvement in internal conflict, it will end up grounding its foundational norms in the very principles that are inconclusively contested. Legal condemnation will thus be indistinguishable from mere political condemnation.

Legal assessments are, of course, inherently and ineluctably political. They are not, however, reducible to mere partisanship; indeed, it is precisely the political purposes that they serve that require their transcendence of immediate political agendas. Events such as Russia's putative annexation of Crimea and its intervention in Eastern Ukraine, though resistant to total abolition, are nonetheless fairly rare occurrences in contemporary international relations. To keep them rare, the international order needs to be able to distinguish violations of foundational norms from conduct that is merely politically provocative, and thus subject to assessments that turn on differing geostrategic interests and ideological principles. It is a pluralist normative order that establishes and maintains the capacity to call aggression by its true name.

18. See generally BRAD R. ROTH, *SOVEREIGN EQUALITY AND MORAL DISAGREEMENT* (Oxford University Press 2011).